No. 20,157

In the United States Court of Appeals for the Ninth Circuit

AMCO ELECTRIC, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of Amco Electric (herein "Amco") to review an order (R. 22-31)[1] issued against it on May 24, 1965, by the

[1] References to the pleadings, decision and order of the Board, and other papers reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr." "G.C. Exh." and "R. Exh." refer to exhibits of the General Counsel and petitioner, respectively. References preceding a semicolon are to the Board's findings; those following, to the supporting evidence.

National Labor Relations Board, following proceedings under Section 10 of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*).[2] In its answer the Board requested enforcement of its order. The Board's decision and order are reported at 152 NLRB No. 86. This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the Act, the unfair labor practices having occurred at Vandenburg Air Base in California, where at the time, Amco, an electrical contractor, was engaged in the construction of missile sites.

COUNTERSTATEMENT OF THE CASE

I. The Board's Findings of Fact

Briefly, the Board found that Amco discharged employee Donald L. Crowe because he engaged in union activity which was protected by Section 7 of the Act, and that Amco thereby violated Section 8(a)(3) and (1) of the Act. The Board's findings are based upon the following underlying facts:

A. *Background*

In the spring of 1964,[3] Amco held a subcontract from Allied Shafer, the general contractor, to perform electrical work at seven Minute Man Missile Sites at Vandenburg Air Base. Amco employed some

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[2] The pertinent provisions of the Act are set forth, *infra*, p. 19.

[3] Unless otherwise indicated, all dates are in 1964.

60 electricians who were members of the Union [4] to do this work.

Discriminatee Donald Crowe, a union member, began working for Amco as a journeyman electrician on April 27. About the end of May, Crowe and four other Amco employees resigned in protest over the treatment of a fellow employee. The following day, the matter was adjusted through the efforts of the Union's business manager, David Milne, and the five returned to work (R. 10; Tr. 6). A week later, Amco laid off the same five employees, including Crowe, admittedly because of their protest the week before (T. 10; Tr. 7). Again, Milne intervened and arranged for the five to return to work on the following day (R. 10; Tr. 7).

B. *Crowe's discharge*

On June 19, the day of his discharge, Crowe was one of about 10 electricians working at missile site C under Foreman Raymond Cassidy. When Crowe, who was working in an underground capsule, made a trip to the surface to obtain supplies, he observed two Ironworkers lowering a fan down the access shaft (R. 23; Tr. 9). In response to Crowe's questions, the Ironworkers said that they had been ordered to install the equipment by their foreman, but conceded that the work belonged to the Electricians. Crowe asked them to suspend the work for a few

[4] Local 413, International Brotherhood of Electrical Workers, AFL-CIO.

minutes while he got in touch with his union steward.[5] The Ironworkers agreed. Crowe then walked to an Amco truck parked about 30 feet away which had a radio-telephone (R. 23; Tr. 9, 10). He tried twice to call Union Steward Wilbur Savage, whom he believed to be at Site D, some 3 to 5 miles distant, but without success (Tr. 10, 19-20). Crowe then tried to call Frank Lowater, an electrician foreman who travelled from site to site (R. 25; Tr. 10, 14, 20). Lowater received Crowe's call on his truck radio just as he arrived at Site 23, about 8 or 9 miles from Site C (R. 25; Tr. 91). Crowe asked Lowater if he knew where Steward Savage was. Lowater replied that Savage was there at Site 23. Crowe told Lowater about the problem with the Ironworkers, and asked him to transmit the information to Savage and ask Savage to come to Site C (R. 25; 13, 20, 91). Lowater agreed to do so, adding that he would be right over himself (Tr. 91).[6]

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[5] Article II, Section 13, of the Union's contract with Amco provides for the appointment of a steward who "shall see that working conditions of this Agreement are observed." Section 13 provides further that, "Under no circumstances shall the Employer dismiss or otherwise discriminate against an employee for making a complaint or giving evidence with respect to an alleged violation of any provisions of this Agreement" (R. Exh. 1, p. 9). Article I, Section 5, provides, *inter alia*, that "All grievances or questions in dispute shall be adjusted by the duly authorized representatives of both parties to this Agreement" (R. Exh. 1, p. 2).

[6] Earlier that day, a superintendent of Allied Shafer, the general contractor, had given Lowater orders to install the same fan which the Ironworkers had been handling until asked to stop by Crowe (Tr. 93, 96).

Just before Crowe made his radio calls, Steward Savage, Union Business Manager Milne and an official of the general contractor, Allied Shafer, had met and resolved a different jurisdictional problem involving the Ironworkers (Tr. 30, 37). As that meeting broke up, Amco Vice President Norman Coghlin and Amco General Foreman Speck Conley drove up. Upon learning from Savage and Milne that the Ironworkers dispute had been settled, Coghlin and Conley left (Tr. 31, 52). Soon thereafter, Lowater drove up and delivered Crowe's message to Savage (Tr. 32, 54). A minute or two later, Coghlin and Conley returned. Coghlin jumped out of his station wagon and asked Savage if he had heard the conversation on the radio-telephone between Crowe and Lowater. Savage said, "No, why?" Coghlin replied that Crowe was giving orders for Savage to get over to Site C. Savage said that he had not heard the conversation because his radio was off. Coghlin said, "Who does he think he is, the foreman? He can't give orders around here. I will get his check" (R. 25; Tr. 32, 54).

Coghlin and Conley then departed for Amco's office in Altadena, about 18 miles away (Tr. 84). At the same time, Lowater and Savage, in separate trucks, set out for Site C (Tr. 33, 95). Enroute to Site C, Savage heard Coghlin attempt to call Foreman Cassidy at Site C without success. Savage volunteered to give a message to Cassidy. Coghlin told him to pick up Crowe's time record from Cassidy and bring it to Amco's office (Tr. 33). Lowater, upon his arrival at Site C, encountered Crowe and advised him that he was about to be discharged.

Crowe asked the reason. Lowater replied, "Because you used a radio to call for the steward" (Tr. 13, 92-93).[7] Crowe went up to the surface, sought out Foreman Cassidy and asked Cassidy whether he was discharged. Cassidy verified the discharge and told Crowe that it was because he had used the radio to call his steward (Tr. 13). Crowe then retrieved his tools; about a half hour later, he received his final check (Tr. 13).[8]

II. The Board's Conclusions and Order

On the foregoing facts, the Board found (R. 27), contrary to its Trial Examiner, that Amco discharged Crowe because he sought to summon Steward Savage to Site C to represent the Union in the dispute with the Ironworkers over the installation of a fan.[9] Since Crowe's action was protected by Section 7 of the Act, the Board concluded (R. 27) that his discharge violated Section 8(a)(3) and (1) of the Act.

The Board's order (R. 28) directs Amco to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their Section 7 rights. Affirmatively, the Board's order

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[7] Amco, at that time had no rule against employees using the radio (R. 12; Tr. 78).

[8] After telling Crowe about his discharge, Lowater borrowed two Amco employees from Foreman Cassidy and with their help installed the disputed fan in less than an hour (Tr. 96).

[9] The Trial Examiner found that Crowe was discharged for summoning Lowater to Site C. We show *infra* that the Board was justified in overruling the Trial Examiner's conclusion.

requires Amco to reinstate Crowe, to make him whole for any wages lost by reason of his wrongful discharge and to post the usual notice.

ARGUMENT

Substantial Evidence on the Record Considered as a Whole Supports the Board's Finding That Amco Violated Section 8(a)(3) and (1) of the Act by Discharging Employee Crowe Because He Engaged in Union Activity Protected by Section 7 of the Act

The law is well settled that an employee with a complaint about his working conditions who presents his grievance to management through prescribed procedures is engaged in activity protected by Section 7 of the Act. *N.L.R.B.* v. *Thor Power Tool Co.*, No. 14,972, decided October 8, 1965, 60 LRRM 2237 (C.A. 7); *N.L.R.B.* v. *Bowman Transportation Co.*, 314 F. 2d 497 (C.A. 5), enforcing 134 NLRB 1419; *N.L.R.B.* v. *Symons Mfg. Co.*, 328 F. 2d 835 (C.A. 7); and see *Radio Officers Union* v. *N.L.R.B.*, 347 U.S. 17, 39-40.

The collective bargaining contract (Article II, Section 13) in this case provided for the appointment by the Union of a steward who "shall see that working conditions of this agreement are observed" (R. Exh. 1, p. 9). Another Section (Article I, Section 5) provided that "all grievances or questions in dispute" were to be adjusted by the representatives of the parties to the agreement, i.e., union stewards or other officials and their managerial counterparts. The Board found that Crowe was discharged for trying to communicate during working hours with his steward,

who was at a different job site, to notify him of a threatened jurisdictional dispute resulting from the performance by Ironworkers of work which Crowe thought should rightfully be performed by members of his Union (R. 27). If, as we show below, this factual finding is supported by substantial evidence, there is no question but that Crowe's discharge was unlawful under Section 8(a)(3).[10] See cases cited *supra*, p. 7.

There is no dispute that Amco officials Coghlin and Conley decided to discharge Crowe immediately after they overheard his radio-telephone conversation with Lowater about the jurisdictional problem at Site C. The basic issue of fact in the case is precisely what Coghlin and Conley heard that caused them to discharge Crowe. Amco Vice President Coghlin was Amco's sole witness. Coghlin testified that he heard no request by Crowe that Lowater send Steward Savage to Site C—only a request that Lowater come to Site C himself. According to Coghlin, he decided to discharge Crowe because these "orders" to Lowater, a foreman, allegedly violated Article III, Section II of the agreement which provided that "On jobs having a Foreman, workmen are not to take directions or orders or accept the layout of any job from anyone except the Foreman" (Tr. 72-73, 74, 75, 78, 80-81, R.

[10] The discharge was equally violative, of course, of the provision of Article II, Section 13, of the bargaining agreement which was declarative of the federal labor law, and stated that an employee should not be discharged or otherwise discriminated against for lodging a complaint or giving evidence with respect to an alleged violation of the bargaining agreement.

Exh. 1, p. 9). However, the evidence amply supports the Board's finding that Crowe asked Lowater to apprise Savage of the situation at Site C and to urge Savage to go there, that Coghlin and Conley heard this message, and that they discharged Crowe because of it.

As the record shows, Crowe's testimony (Tr. 10, 13, 20) that he asked Lowater to tell Savage about the jurisdictional problem at Site C and to urge Savage to go there was fully corroborated by the testimony of three other witnesses—Lowater, Savage and Union Business Manager Milne. Thus, Foreman Lowater testified that he received this message for Steward Savage and promptly transmitted it to him at Site 23 (Tr. 91).[11] That such a message was received by Savage, is evidenced, of course, by the fact that he promptly proceeded to Site C.[12] As for Savage and Milne, though neither overheard Crowe's conversation with Lowater because their radio was off, both confirmed Lowater's testimony that he delivered Crowe's message to Savage at Site 23 just prior to the return of Amco officials Coghlin and Conley (Tr. 32, 54).

The evidence is equally strong that it was Crowe's efforts to get Savage to Site C, overheard by Coghlin and Conley, that aroused their anger. Thus, both Savage and Milne testified that when Coghlin and

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[11] When he gave this testimony, Lowater was still in Amco's employ (Tr. 90).

[12] Amco errs in its assertion (Br. p. 15) that Savage did not go to Site C after Crowe requested his presence. The uncontradicted testimony of Savage shows that he did proceed to Site C (Tr. 33).

Conley returned to Site 23 immediately after Lowater had delivered Crowe's message to Savage, Coghlin's complaint was that Crowe was giving orders over the radio for *Savage* to come to Site C (supra, p. 5). Further, when Lowater apprised Crowe of his discharge, having overheard the conversation between Coghlin and Savage as Lowater was driving to Site C, Lowater told Crowe that he reason was, "Because you used a radio to call for the steward" (Tr. 13). Finally, according to Crowe's uncontradicted testimony, his foreman, Cassidy, told him he was fired because he used the radio *to call Steward Savage* (*supra*, p. 5).[13] In view of the foregoing evidence, the Board was clearly warranted in finding that the "reason for [Crowe's] discharge was his conduct in trying to communicate during working hours with his steward, who was at a different work site" (R. 27).

The Board's conclusion is not impaired by certain testimony of Foreman Lowater to which Amco attributes great weight. Under cross-examination by his employer's counsel, Lowater testified that it was "possible" that Crowe had told him to come to Site C as well as to notify Savage of the problem there (Tr. 94). Thereafter, when asked to state once more what Crowe had said, Lowater replied, "Well, I don't recall the exact words that he used, but it was more for me to get hold of Doc Savage and to come over to Charley Site; the Ironworkers were doing our work"

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[13] Amco did not call on Cassidy to testify.

(Tr. 95).[14] This testimony indicates, at most, that Coghlin heard Crowe attempt to recruit Lowater, as well as Savage, to deal with the jurisdictional problem at Site C. It does not affect the Board's finding that it was Crowe's effort to bring over *Savage*, not *Lowater*, which caused Coghlin to have him discharged. As shown *supra*, that finding rests firmly on the testimony of union officials Savage and Milne that Coghlin complained to them only about Crowe's efforts to reach Savage, as well as the corroborating testimony of Crowe and Lowater. Moreover, even if Crowe asked Lowater, as well as Savage, to come to Site C, and the request for Lowater's presence played some part in Amco's decision to discharge Crowe, Amco's action was still unlawful since Crowe's efforts to summon Savage was, on the record here, "at least a contributing cause of his discharge." *Cupples Co. Mfrs.* v. *N.L.R.B.*, 106 F. 2d 100, 117 (C.A. 8); *N.L.R.B.* v. *Jamestown Sterling Corp.*, 211 F. 2d 725, 726 (C.A. 2); *N.L.R.B.* v. *West Side Carpet Cleaning Co.*, 329 F. 2d 758, 761 (C.A. 6); *Butler Bros.* v. *N.L.R.B.*, 134 F. 2d 981, 985 (C.A. 7), certiorari denied, 320 U.S. 789; *N.L.R.B.* v. *Minnesota Mining & Mfg. Co.*, 179 F. 2d 323, 326 (C.A. 8).

Nor is the Board's finding as to the reason for Crowe's discharge impaired by the fact that the Board declined to follow the Trial Examiner in cred-

[14] In view of Lowater's failure to mention a request to come over to Site C himself in his earlier testimony (Tr. 91), he may well be mistaken here. Earlier, he testified that he had told Crowe "I will be right over" (Tr. 91), but he made it clear that he went to Site C "because of [his] prior orders" from the general contractor (Tr. 93).

iting Coghlin's claim that he discharged Crowe only because Crowe asked Lowater to come to Site C. It is well settled that the Board may, as it did here, disregard the findings of a Trial Examiner where he credits testimony which "conflicts with well supported and obvious inferences from the rest of the record." *N.L.R.B.* v. *Pyne Molding Co.*, 226 F. 2d 818, 819 (C.A. 2). Accord: *N.L.R.B.* v. *Waterfront Employers*, 211 F. 2d 946, 953 (C.A. 9); *N.L.R.B.* v. *Eclipse Lumber Co.*, 199 F. 2d 684, 686 (C.A. 9); *N.L.R.B.* v. *Jackson Maintenance Corp.*, 283 F. 2d 569, 570 (C.A. 2); *N.L.R.B.* v. *Pacific Intermountain Express Co.*, 228 F. 2d 170, 174 (C.A. 8). This is particularly true where, as with Coghlin's testimony, "the testimony in question is given by an interested witness and relates to his own motives." *N.L.R.B.* v. *Pyne Molding Corp., supra.*

Amco also errs in contending (Br. pp. 13-16) that the Trial Examiner's preference for Coghlin's testimony over Crowe's was founded on demeanor evidence which was not available to the Board. It is clear from the Trial Examiner's decision, that his distrust of Crowe's testimony was based upon his analysis of the record which the Board deemed not unreasonable, but less tenable than its own analysis of the record. Thus, the Trial Examiner's suggestion (R. 11) that Crowe had little real interest in getting in touch with Savage failed, in the Board's view to give adequate weight to the evidence, discussed above, that Lowater, after talking to Crowe, immediately sought Savage and advised him of the situation at Site C. Again, the Trial Examiner's finding (R. 11) that Savage did little or

nothing when he arrived at Site C, from which the Trial Examiner infers a lack of interest on Crowe's part in having Savage there, discounts the fact that Lowater preceded Savage to Site C and promptly performed the disputed work in accordance with instructions which he had received earlier that day (Tr. 93, 96). Finally, the Trial Examiner erroneously attributed to Crowe testimony that Lowater was only 3 to 5 miles away when Crowe reached him by radio (R. 12). This was a further reason for discounting Crowe's testimony, in the Trial Examiner's view (R. 12). However, Crowe testified that *Site D*, where Steward Savage was usually to be found,—not Site 23,—was 3 to 5 miles from Site C (Tr. 14). The distance between Site C and *Site 23*, where Crowe located Lowater, both Crowe and Savage estimated as being 8 to 10 miles (Tr. 22, 34).

Amco in its brief to the Court (pp. 12-13) for the first time argues that if it is not sustained in its claim that it discharged Crowe for directing Lowater to come to Site C, an alternative reason for which it *might* have discharged Crowe was that he "ordered Lowater, a foreman, to locate Savage and tell Savage to come over to Site 'C'." This argument is unavailing to Amco, however, for it is inconsistent with the assertion of Coghlin, which Amco relied on throughout the proceeding before the Board, that the decision to discharge Crowe was based solely on his summoning Lowater to Site "C". Coghlin expressly denied that he heard Crowe request Savage's presence at Site C (Tr. 80-81, see also Coghlin's testimony at Tr. 72-73, 74, 75, 78). The defense that Amco now seeks to

raise, therefore, is plainly a belated effort to evade the key factual issue in the case, and to salvage a position which has been disproved by the evidence. But Amco must stand or fall on the reason it has already advanced and the record it has already made as to the explanation for Crowe's discharge. It cannot simply introduce as an afterthought at this stage of the proceeding an alternative reason and assert in effect that if the first reason does not bear scrutiny, this new justification which has just been thought of should be considered. Rejection out of hand must obviously be made of the alternative reason proffered in such circumstances. A Board proceeding in a case involving alleged discrimination is not a guessing game, but rather involves a search for the true reason underlying the action complained of. When the reason advanced by a party proves false, the inference that the action was unlawfully motivated is thereby strengthened. When as here, an alternative and inconsistent reason is then offered, not only is it unworthy of consideration, but it further augments the inference of illegality. *N.L.R.B.* v. *Dant and Russell*, 207 F. 2d 165, 167 (C.A. 9); *N.L.R.B.* v. *Radcliffe*, 211 F. 2d 309, 314 (C.A. 9), and cases cited, certiorari denied 348 U.S. 833; *N.L.R.B.* v. *Georgia Rug Mill*, 308 F. 2d 89, 91 (C.A. 5).

Amco also argues, in effect, that even if, as the Board found, Crowe did ask for Savage's presence at Site "C," the request amounted to an "order" to Lowater and therefore violated Article III, Section 11 of the bargaining agreement, which provides that on

jobs with a foreman, workmen are not to take orders from anyone except the foreman. Aside from the fact that this assertion is inconsistent with Coghlin's claim that Crowe did not even mention Savage in his communication with Lowater, the suggestion that Crowe "ordered" Lowater to act, and that Crowe thereby violated the agreement is plainly baseless. When Crowe requested Lowater to convey the message to Savage, Crowe did not "order" Lowater to do anything. An "order" is a "command" or "direction," and Crowe's communication to Lowater plainly did not convey the mandatory obligation that an "order" normally implies. This fact is made more obvious in light of the employee-foreman relation between the two. Crowe's choice of language over the radio-telephone, or even his tone of voice may not have been the most exemplary and may even have been unwise. However, the courts have recognized that an employer may not sit in absolute judgment on the propriety of all remarks made by his employees in the course of protected activity. If such were the case, an employee would hesitate to play an active role in union activity, since he would be "wholly at the mercy of the varied understanding of his hearers and, consequently, of whatever inferences may be drawn as to his intent and meaning." *Thomas* v. *Collins*, 323 U.S. 516, 535. Accord: *N.L.R.B.* v. *Burnup & Sims, Inc.*, 379 U.S. 21. Thus, "[t]he employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. Initially, the responsibility to draw the line between

these conflicting rights rests with the Board, and its determination, unless illogical or arbitrary, ought not be disturbed." *N.L.R.B.* v. *Thor Power Tool Co., supra,* decided October 8, 1965, (C.A. 7), citing, *N.L.R.B.* v. *Illinois Tool Works,* 153 F. 2d 811, 815-816 (C.A. 7). And see *Walls Mfg. Co.* v. *N.L.R.B.* 321 F. 2d 753 (C.A.D.C.), certiorari denied, 375 U.S. 923.

There is another reason why there is no merit to Amco's suggestion that Crowe violated Article III, Section 11, of the bargaining agreement. In addition to the fact that Crowe's message to Lowater was not an "order" in the accepted sense of the word, the incident plainly does not present the type of situation contemplated by that contract provision. Section 11, in the context in which it appears (see Article III, Section 10, which precedes it) obviously is intended to establish the chain of command on the job, and does not purport to be a regulation of employee conduct. Furthermore, Section 11 by its terms, is not a prohibition on employees *giving* orders. Accordingly, as the Board pointed out, "There would be no violation of this provision by Crowe even if . . . Crowe, an employee, was giving directions or orders to Lowater, a foreman" (R. 26).

In sum, we submit that on the basis of the foregoing considerations, the Board reasonably concluded that in view of the impact of the jurisdictional conflict with the Ironworkers on the work to be performed by Crowe and his fellow Electricians, Crowe, "in attempting in the manner and under the circumstances herein to reach his steward, was engaging in

a union or protected concerted activity. His discharge for such conduct was, therefore, violative of Section 8(a)(3) and (1) of the Act." [15]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition to review should be denied, and that a decree should issue enforcing the Board's order in full.

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National Labor Relations Board.

October 1965.

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[15] The discharge of an employee for engaging in union activity has the "natural consequence" of discouraging such activity. Accordingly, contrary to Amco's assertion (Br. pp. 7-11), proof of the employer's motive in circumstances such as those presented on this record is unnecessary. *Radio Officers Union* v. *N.L.R.B.*, 347 U.S. 17, 44-45; *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, 227. Accord: *Pittsburgh-Des Moines Steel Co.* v. *N.L.R.B.* 284 F. 2d 74, 83 (C.A. 9).

Certificate

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

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